

**MICHAEL STEPTOE**  
Claimant

**RUSTY ECK FORD, INC.**  
Respondent

**DEPOSITORS INSURANCE COMPANY**  
Insurance Carrier

<sup>1</sup> Easy Detail was not originally a party to this claim but it appears after this Order was filed that claimant amended his claim to include Easy Detail as a party as well as the Kansas Workers Compensation Fund, inasmuch as Easy Detail is uninsured.

Moreover, claimant argues that his notice of his injury to the owner of Easy Detail satisfied the statutory requirement of notice to the statutory employer.

Respondent contends the Board does not have jurisdiction over this appeal under K.S.A. 44-534a(a)(2) and it should therefore be dismissed. In the alternative, respondent maintains the ALJ's Order should be affirmed in all respects.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was hired to work as a car detailer by Hasan Burnom, an individual who (along with his wife) does business as Easy Detail. Mr. Burnom's company was retained by Rusty Eck to detail its cars and assigned a certain area within Rusty Eck's maintenance shop to perform this job. Rusty Eck paid Easy Detail a certain sum for each type of car detailed and in turn, Mr. Burnom would pay claimant a set sum for each car he cleaned.

At no time did Rusty Eck pay claimant directly or provide any materials used in this endeavor. All of his wages came from Mr. Burnom or Mr. Burnom's wife and it came in cash, never as a check. Easy Detail provided all of the materials and equipment for each of the workers to use in cleaning the cars, but Mr. Burnom requires each individual, including claimant, to pay \$50 per month towards the cost of those supplies. At the end of the year Easy Detail issues a 1099 to each of its workers, treating them as independent contractors.

According to Mr. Burnom he has the right to hire and fire the workers and direct their work. However, claimant testified that Alan and Alex, the car managers with Rusty Eck Ford, had the right to direct his work, periodically altering the order in which the cars were cleaned. Easy Detail's workers were given access to the dealership's car wash. Claimant was also provided access to Rusty Eck's on-site gym and Rusty Eck provided him with discounts for his automotive related purchases and services just like it would its own employees.

Mr. Burnom testified that he, like claimant and all the other detailers, is an independent contractor for the business known as Easy Detail. Mr. Burnom says he is the supervisor or foreman for the business. Easy Detail used to have its own shop on North Broadway in Wichita, Kansas and there the business would detail cars for other individuals and dealerships in addition to Rusty Eck. But approximately 5 years ago he relocated the business to Rusty Eck's shop and focused his business at that location and solely on Rusty Eck's automobiles, although he concedes that other businesses were off-site customers. These other customers were serviced by trucks that contained power washers.

On April 26, 2008, while cleaning the outside of a car claimant was injured when a coworker attempted to move the vehicle and struck claimant. Claimant informed Hasan Burnom of his work-related injury and sought treatment at a local emergency room. He was thereafter treated by a chiropractor and given work restrictions. There is a dispute between claimant and Mr. Burnom as to whether modified duty was available or whether claimant was terminated due to the work-related injury.

After considering this evidence the ALJ concluded that claimant had failed to establish an employment relationship existed between himself and Rusty Eck Ford, although he had succeeded at proving an employment relationship between himself and Easy Detail. But Easy Detail is not a party to this action (as of the time of the preliminary hearing) and therefore claimant was denied benefits.

Before considering the merits of this appeal, this Board Member must consider respondent's argument that there is no jurisdiction to hearing this matter. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders.

Although respondent maintains there is no jurisdiction for this appeal, this Board Member disagrees. Implicit in the issues delineated in K.S.A. 44-534a is the question of employment status. That question is at the heart of this appeal and this claim. The identity of claimant's alleged employer is critical to determining whether his injury arose out of and in the course of his employment. Thus, there is jurisdiction for this appeal.

It is the claimant's burden of proof to establish his right to an award of compensation and to prove those conditions on which the claimant's right depends.<sup>2</sup> Claimant's burden to prove coverage under the Act, also includes the obligation to establish that he or she is, in fact, an employee of the respondent.

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<sup>2</sup> *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

Here, the ALJ concluded that the claimant successfully established that he was an employee of Easy Detail. This Board Member agrees with that conclusion. It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.<sup>3</sup>

There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>4</sup> The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.<sup>5</sup>

The test primarily used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.<sup>6</sup>

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

- (1) The existence of a contract to perform a piece of work at a fixed price.
- (2) The independent nature of the worker's business or distinct calling.
- (3) The employment of assistants and the right to supervise their activities.
- (4) The worker's obligation to furnish tools, supplies and materials.
- (5) The worker's right to control the progress of the work.
- (6) The length of time the employee is employed.
- (7) Whether the worker is paid by time or by job.

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<sup>3</sup> *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

<sup>4</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>5</sup> *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

<sup>6</sup> *Wallis*, 236 Kan. 102-103.

(8) Whether the work is part of the regular business of the employer.<sup>7</sup>

The evidence within this record certainly supports the ALJ's conclusion with respect to the relationship between claimant and Easy Detail. Hasan Burnom was actively involved in the daily progress of the claimant's work detailing the cars at Rusty Eck Ford. He provided the materials and supplies for the work performed, although he did compel the workers to contribute to the cost of those items. And although claimant and the other workers were paid on a per-car basis, that factor alone is not determinative. Clearly claimant had no control over the speed of his work as Mr. Burnom would encourage him to work faster. And claimant did not get to decide which cars he detailed. All of that was dictated to him by either Mr. Burnom or someone at Rusty Eck Ford. When taken as a whole, this Board Member agrees with the ALJ's conclusion that claimant was an employee of Easy Detail. Thus, that aspect of the Order is affirmed. Unfortunately, the factual finding does not aid claimant in any meaningful fashion because Easy Detail is not a party to this litigation (at least as of the time of the preliminary hearing).

However, with regard to Rusty Eck Ford, the respondent herein, this Board Member concludes the ALJ's conclusion as to employment status must be reversed.

Claimant argues that he, as an employee of Easy Detail, is a statutory employee of Rusty Eck. This argument stems from the provisions of K.S.A. 44-503(a) which state:

(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, **the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal;** and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, **references to the principal shall be substituted for references to the employer,** except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed.<sup>8</sup>(Emphasis added.)

A principal purpose of K.S.A. 44-503(a) is to "prevent employers from evading liability under the act by the device of contracting with outsiders to do work which they have

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<sup>7</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

<sup>8</sup> K.S.A. 44-503.

undertaken to do as a part of their trade or business.”<sup>9</sup> There is a two-part test to determine whether the work which caused the injury is part of the principal’s trade or business, *i.e.* (1) is the work being performed by the injured employee necessarily inherent in and an integral part of the principal’s trade or business? (2) is the work being performed by the injured employee such as is ordinarily done by employees of the principal? If either of the foregoing questions is answered in the affirmative the work being done is part of the principal’s trade or business, and the injured employee is a statutory employee of the principal.<sup>10</sup>

Respondent’s brief merely contends that “no employer-employee relationship, statutory or otherwise, ever existed between the claimant and Rusty Eck”.<sup>11</sup> However, respondent fails to dispute claimant’s contention that cleaning and detailing cars that are offered for sale is part and parcel of respondent’s business. As claimant argues, the cars must be clean and presentable in order to sell them. Respondent even has its own car wash onsite. The record is silent as to whether respondent formerly had its own employee(s) perform the work it contracted for with Easy Detail. If that were the case, then clearly under the applicable case law, claimant would be deemed to be a statutory employee. Nonetheless, under these facts it appears that the act of cleaning a car, preparing it for sale, is most certainly an integral part of respondent’s sales process. There is, after all, a car wash on the premises. It stands to reason that the service Easy Detail provides increases the likelihood of selling cars, respondent’s ultimate goal. For these reasons, this Board Member finds that claimant is, in fact, a statutory employee of respondent Rusty Eck.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>12</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated September 26, 2008, is affirmed in part (as to Easy Detail) and reversed in part (as to respondent Rusty Eck Ford) and remanded for further proceedings.

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<sup>9</sup> *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 348 (1992).

<sup>10</sup> *Hanna v. CRA, Inc.*, 196 Kan. 156, 409 P.2d 786 (1966).

<sup>11</sup> Respondent’s Brief at 6 (filed Oct. 30, 2008).

<sup>12</sup> K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2008.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant  
Timothy A. Emerson, Attorney for Respondent, Rusty Eck Ford and its Ins. Carrier  
David M. Bryan, Attorney for Respondent, Easy Detail  
Nelsonna Potts Barnes, Administrative Law Judge